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IS THE AMERICAN MEDICAL ASSOCIATION AN UNLAWFUL COMBINATION?

So many voluntary organizations are feeling the prod of the Sherman act to get up and move on, that no society, however commendable it may believe its motives to be, can indulge a feeling of security from such attacks.

To-day, it is the American Medical Association, an association, now grown very powerful and active and said to represent over a hundred thousand practicing physicians. The charge that this association is a trust comes up from two sources, the independent medical press and the representatives of the drug trade.

The charge against this association is to the effect that, like a great commercial or political combination, a few active and leading spirits of the medical fraternity, seeing better things ahead which are not altogether and exclusively in the interest of the suffering public, have organized every state and county as links in a most powerful combination which is now attempting to use its power, much after the manner of the labor union, to arbitrarily fix the fees for all medical service, to blacklist all patients who refuse to pay their doctor's bills, to deprive of his standing in the profession any physician who refuses to abide its regulations, to suppress all independent medical journals and establish in their stead national and state organs, and lastly, to attempt to suppress, either by the strictest regulation or prohibition, if possible, the sale of all proprietary or patent medicines, and "irregular" medical colleges and eleemosynary institutions.

The air is full of the coming conflict. We are receiving inquiries and suggestions from lawyers, druggists and others, all over the

country, stating the case and asking for our opinion. Many instances of oppression are related. One very reputable medical publication, the "Medical Record of New York," is reported to have attacked the aggressive political activity of the association in certain instances. This brought forth a stinging reply from the national organ of the association against the publishers of this journal, Wm. Wood & Co., suggesting that "they think over this whole matter, that they consider whether it becomes a firm which has been able to amass a fortune from the support given it by the medical profession to allow its publication to oppose a movement endorsed by the best element in that profession," and threatening a boycott of their publications.

Again the association has proscribed, it is charged, any medical journal which contains the advertisement of any chemical preparation not having the approval of the Council of Pharmacy. The rules promulgated by this council provide that the secrets of manufacture as well as chemical composition of any preparation must be divulged, that no trade name, not descriptive of the ingredients, can be adopted, and that no information must be given to the public of the names of the diseases for the treatment of which the remedy is indicated. It is not difficult to understand why the entire independent medical press is up in arms. Its very existence it at stake. The Charlotte (N. C.) Medical Journal, says: "Who gave this Council the right to dictate to the press what shall and shall not be advocated? This is the most insolent, high handed and outrageous act of all the brazen acts of the political machine that controls the American Medical Association and its organ."

Another complaint specifies the activity of the Association in influencing State Examining Boards to refuse to recognize graduates of schools which happen to be under the ban of another council within the Association's organization, known as the Council on Medical Education. So powerful has become this council in this respect that very few schools can hope to exist against the

arbitrary fiat of this comparatively small body of men. The president of the Albany (N. Y.) Medical College which has been declared to be "irregular," has this to say: "Such recommendations as that of Dr. Bevan's in his address as Chairman of the Council, 'that state boards of each state should refuse recognition to those schools which are not teaching "scientific medicine,"' I have opposed and shall continue to oppose. Until such time as our medical examining boards are created in a different manner, it would be, in my judgment, in the highest degree impolitic, inexpedient, unsafe and unjust to place any such responsibility in their keeping."

The center of the conflict right now seems to be around the effort of the unusually enterprising leaders of this association to force upon state and national legislatures the adoption of its pet scheme, to-wit, a state establishment of medicine. Apparently unmindful of the fact that such a universal and arbitrary censorship of the practice of medicine as they advocate would be as distasteful to the people and as inimical to our public policies as the establishment of a state religion, these enthusiasts are rushing headlong to certain defeat. Their propaganda is amazing in its demands and includes compulsory and arbitrary supervision over medical colleges, hospitals, asylums, the sale of drugs and other food products, the registration of druggists and drug manufacturers and many other kindred subjects, the regulation of which are all possible only under the most extraordinary legislative power, i. e., the police power. Certainly, to complacently ask a legislature to turn over to a board of physicians, no matter how competent, with all their acknowledged jealousies and petty politics, the free exercise of this tremendous power over the lives and health of their fellow citizens is astounding to say the least.

This is a brief statement of a mass of evidence which has been put before us. We have been asked several questions in relation thereto. Is such an association as is here depicted, an unlawful combination? Can such powers as are proposed to be giv-

en to boards of health or bureaus of state medicine, be thus delegated by a legislature?

Those who know our position on the subject of police powers may at once assume, and assume correctly, our answer to the second question. The police power is not something to be played with by any enthusiast that offers to use it for the public good. For every such use of this great power, which such a board seeks to exercise, it must show the specific authorization of the legislature. It cannot be trusted to legislate, in the form of regulations or otherwise, on such matters. Not because they are not competent to do so, but simply because they are not the properly constituted body to do so, nor one over which the people have any effective control.

As to the first question propounded we are in doubt and shall reserve our opinion to be expressed by the writer of our annotations, Judge N. C. Collier, when he comes to annotate the important recent case of *Rohlf v. Kasemeier*, 118 N. W. 276. In this case fourteen physicians of Bremer county, Iowa, were indicted for unlawful conspiracy, for combining to establish and maintain a certain scale of fees. The Iowa Supreme Court has held in that case that it is no crime for any number of persons, without any unlawful object in view, to associate themselves together, and agree that they will not work for or deal with certain classes of men, or work under a certain price, or without certain conditions, and a union of laborers or professional men for the purpose of advancing wages is not unlawful. This decision will be presumed for the purpose of this editorial to state the correct rule of law unless upon investigation, as above indicated, our annotator should think otherwise. At any rate this decision merely decides that a combination for such purpose is not unlawful. It does not decide that the methods used to force others into the combination may not be unlawful and thus make applicable the principles applied in the important case of *Loewe v. Lawler*, 208 U. S. 274, 52 L. Ed. 488, 28 Sup. Ct. 564.

NOTES OF IMPORTANT DECISIONS.

GAME AND GAME LAWS—EXEMPTING DOMESTICATED WILD ANIMALS FROM OPERATION OF GAME LAWS.—A recent decision which our learned contemporary, the New York Law Journal, calls a "set-back to the protection of game," we are inclined to believe to be in the interest of human progress and happiness.

The decision referred to was rendered recently by the New York Court of Appeals in the case of *Dieterich v. Fargo*, reversing the same case in the Appellate Division of the Supreme Court (119 App. Div. 315). The effect of the decision was to exempt domesticated deer from that section of the game laws of New York, which permitted only one deer to be offered for transportation and that only when the carcass accompanied the owner.

The argument of the judge who wrote the opinion, deals largely with technical features of construction. The learned judge said: "When we come, however, to the provision that no person shall take more than two deer in the open season and to the provisions relating to the transportation of venison, it seems to me that a different intention is disclosed, and that those parts of the statute apply only to wild deer. The statute is highly penal in its character, making every violation thereof a misdemeanor and, therefore, it should not be construed so as to embrace cases which do not clearly fall within its terms. Where, as in the case at bar, the venison is plainly marked and readily identifiable as having been obtained from domesticated deer, it is difficult to perceive any good reason for prohibiting its sale during the open season, and I do not think that we ought to read such a prohibition into the Forest, Fish and Game Law by judicial construction. If the legislature shall consider further safeguards necessary in order to prevent an evasion of the provisions relating to wild deer, it may readily provide for a system of inspection and certification by the game warden or otherwise before the venison of domesticated deer is allowed to be received for transportation. The keepers of domesticated deer might be required to register as such with the forest, fish and game commissioner before their venison was thus receivable. It must not be inferred from anything which has been said that the owner of lands frequented by wild deer can render them domesticated simply by inclosing their domain with a fence and denominating it a deer park. The domestic character of the plaintiff's deer is unquestioned, and it is only deer which are strictly of that nature that are to be deemed outside the statutory provisions relating to the

transportation of game in the open season. As the law now stands, however, I think that domesticated deer may lawfully be killed and the venison thereof may lawfully be accepted for transportation by an express company in this state without restriction as to number, provided this is done only in the open season."

The argument of the editor of the New York Law Journal is the argument used by all good sportsmen and lovers of nature in pushing forward the stringent legislation which is upon so many of our statute books. We sympathize with the spirit which actuates these game-law enthusiasts, but we have come to regard many of these laws as an unnecessary burden upon private rights simply in order to meet a useless and impossible ideal. The editor of the New York Law Journal says: "There is no doubt that the statute is highly penal in character, and that the provision which, as interpreted, prevents the killing of domesticated deer during the closed season, abstractly considered, is violative of rights of private property. It is upheld, because, in the opinion of experts, it is necessary to prevent such evasions as would render the game law practically a dead letter. The supreme court of the United States, as well as courts of many sister states, have gone to extreme lengths in sustaining the constitutionality of game laws under what is represented to be overruling necessity. It is, of course, true that the provision against killing during the closed season and the provision against transportation during the open season, as the latter was construed by the Appellate Division, would prevent engaging in the business of breeding deer in confinement for the market. All of this legislation is framed upon the theory of preserving wild game no matter at what cost to private rights or private business enterprise."

Why should wild game be protected no matter what the cost to private rights of property? As we have said the game law propaganda is largely idealic. Moreover, even the ideal itself is impossible of attainment, as it has become axiomatic that wild animals, whose nature is such that they cannot be domesticated, soon become extinct before the advancing hosts of civilization, no matter what the protection, which only delays the inevitable day of extinction.

To our mind it has always seemed to be more in harmony with a sound public policy to encourage the domestication and sale of wild animals rather than, as at the present time, to practically prohibit such enterprise. It is surely more important that deer should become domesticated and become a universal article of food than it is that a few sportsmen shall enjoy a short period each year of innocent enjoyment.

We trust all our appellate courts will give these considerations more attention before they so construe or hold valid legislation which in effect operates to deprive the owner of land, peculiarly fit for no better purpose than the domestication of deer from all right and opportunity to breed in captivity these important species of *ferae naturae* and to obtain a market for his product. Let there be whatever regulation may seem wise and just to the legislature, but let there be no unwise, and to our mind unconstitutional, prohibition of the propagation and sale of domesticated wild animals.

HOMICIDE—RIGHT TO RESIST ILLEGAL ARREST TO THE EXTENT OF TAKING OFFICER'S LIFE.—The sacredness of one's person from illegal arrest or his habitation from unlawful intrusion, is often disregarded these latter days, especially in our large cities, where it frequently occurs that men are placed under arrest without a warrant and for offenses not committed in the presence of the officer. That such an arrest is unlawful and may be resisted even to the taking of life, is the decision of the Georgia Court of Appeals in the recent case of *Holmes v. State*, 62 S. E. 716.

In the principal case defendant, a negro, was charged by a negro woman with having sworn at her. A policeman without a warrant went to the negro's residence to arrest him. The latter resisted the arrest because the officer had no warrant. By force, the officer dragged the defendant from his house, who, however, finally tore himself from the officer and went into his house and got a "gun." The officer ran after him but the defendant eluded him and ran out of the house with the officer in pursuit. The officer called to him to stop and on his refusal to do so shot at him several times. The defendant then wheeled around and shot at the officer and at a private citizen who had joined the officer in pursuit and killed the latter.

These facts present a very important situation and one which may frequently arise and concerning which every citizen and police officer should be fully advised. The first question presented and determined is the illegality of the arrest attempted, on which point the Georgia court says: "The offense for which defendant was wanted was a trivial violation of a municipal ordinance. This trivial offense was not committed in the presence of the arresting officers, but the day before a complaint was made by the negro woman that the defendant had cursed her 'through the partition between their rooms.' If this information was sufficient on which to base an arrest, it was sufficient on which to base a warrant. There was no want of time or opportunity for either the

complaining woman or the arresting officers to procure a warrant. The defendant was not endeavoring to escape to avoid an arrest, and there was no pressing emergency for his arrest. There seems to have been absolutely no reason for not having procured a warrant and for attempting an arrest without one. A policeman under these circumstances cannot be allowed to dispense with a warrant when making or attempting an arrest any more than other officers of the law. When the policemen went into the defendant's house to arrest him without a warrant, they were trespassers in a double sense—trespassers upon the sacred right of personal liberty, and trespassers upon the right of domicile. The defendant had a legal right to resist both trespasses, and to use in resistance as much force as was necessary to make resistance effective."

The contention was made in the principal case that defendant even if he had a right to kill the officer, he had no right to deliberately kill a private citizen who had joined in the pursuit against him. But the court answered this contention effectually, saying: "The positive evidence for the state, in addition to this undisputed evidence, is that the crowd cried, 'Get him!' 'Shoot him!' 'Shoot him!' If, under these circumstances, the fleeing negro turned and shot back at his pursuers, can it be doubted that the facts were sufficient to justify the fears of a reasonable man that his life was in danger or that he was threatened with serious bodily injury? If, acting under these fears, he shot at his pursuers and killed, not one of the officers, but one who had joined the officers in their felonious pursuit, can it be doubted that the killing was justifiable homicide? Certainly, if the defendant had shot and killed the officer who was pursuing and shooting him, under the circumstances of this case he would have been entirely justifiable. How could he be less justifiable because he shot and killed a private citizen who was more eager in the pursuit than the officer himself?"

In concluding its well-prepared opinion in this case, the court said: "The principles of law which we have announced in the foregoing opinion are not new. They come down to us from the common law. They are well settled both by the statutes and the decisions of the supreme court of this state. This court fully understands and appreciates the delicate, difficult, and sometimes dangerous duties which police officers are called upon to perform, and it will uphold and protect them in the legal discharge of all their duties. But to approve the verdict in this case would be in our opinion a violation of the sacred right of personal liberty, and a disregard of the right of self-defense, which the law guarantees to every citizen, whatever his color or condition."

THE DISTINCTION IN APPLICATION OF THE MAXIM OF RES IPSA LOQUITUR IN PASSENGER AND EMPLOYEE CASES.

The Maxim in Passenger Cases.—Many courts have committed themselves to the broad proposition, as a general rule, that where a passenger is injured by the occurrence of an accident, injury therefrom establishes a prima facie case of negligence against the carrier.¹

But the rule has its limitations, and the principal exception thereto appears to be that the passenger shall not by any act or omission on his part, leave the matter in doubt as to the proximate cause of the injury. Thus it has been held, the passenger must show that he was acting with ordinary care at the time of the injury,² and the injury must be one arising from some part of the machinery for transportation, as, for example, injury from a swinging door on a ferryboat, an ordinary door in plain view being not such.³ And this same rule obtains where the injury is purely accidental, as that of a passenger's fingers being caught in a door opened by an employee.⁴

The Rule Applied to Servants.—The weight of authority announces the converse of the above rule, when there is injury suf-

fered by an employee, from the occurrence of an accident. It has been held that he must go further and show affirmatively the master has been guilty of negligence.⁵

But even the cases which subscribe to the distinction between passengers and employees, admit exceptions in application. Thus there seems in the Patton case, an abatement from the broad statement in the Barrett and Shandrew cases, in the federal courts, for it is said by Justice Brewer in the Patton case: "That in the latter case (suit by employee), it is not sufficient for the employee to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain, and shows that any one of half a dozen things, may have brought about the injury, for some of which the employer is responsible, and for some of which he is not, it is not for the jury to guess between these half a dozen causes, and find that the negligence of the employer was the real cause." In the Stearns case it is said the servant "must show either actual negligence or conditions which are so obviously dangerous as to admit of no inference than that of negligence."⁶

Reasons for the Distinction in Passenger and Employee Suits.—It is quite obvious that where the common law rule prevails that negligence by a fellow servant is not imputable to the master, this would have the effect of making doubtful in very many cases, the cause of the accident or occurrence from which injury results. But the Patton case, which forbids guessing at

(1) New Jersey R. & T. Co. v. Pollard, 89 U. S. (22 Wall.) 341, 22 L. Ed. 877; N. Y. C. & St. L. R. Co. v. Blumenthal, 160 Ill. 40, 43 N. E. 800; Louisville, N. A. & C. R. Co. v. Snyder, 117 Ind. 435, 20 N. E. 284, 10 Am. St. Rep. 60, 3 L. R. A. 434; Baltimore & P. R. Co. v. Swann, 81 Md. 400, 32 Atl. 175; Patton v. Railroad, 179 U. S. 658, 45 L. Ed. 361; Brownfield v. Railroad, 107 Iowa, 254, 77 N. W. 1038; Stearns v. Ontario Spinning Co., 184 Pa. 519, 37 Atl. 292, 39 L. R. A. 292, 63 Am. St. Rep. 867; Southern R. Co. v. Cunningham, 123 Ga. 90, 50 S. E. 979. These cases are given as by no means exhaustive as the principle is practically undisputed.

(2) Bonce v. DuBuque St. Ry. Co., 53 Iowa 278, 5 N. W. 177, 36 Am. Rep. 221; Yarnell v. Railroad, 113 Mo. 570, 21 S. W. 1, 18 L. R. A. 599; Gleeson v. M. R. Co., 140 U. S. 435, 45 L. Ed. 458; Erwin v. Railroad, 94 Mo. App. 297.

(3) Hayman v. Railroad Co., 118 Pa. 508, 11 Atl. 815. See also Penna. R. Co. v. MacKinney, 124 Pa. 462, 17 Atl. 14, 10 Am. St. Rep. 601, 2 L. R. A. 820; Fleming v. Pittsburgh, etc., R. Co., 128 Pa. 130, 27 Atl. 858, 33 Am. St. Rep. 835, 22 L. R. A. 351.

(4) Murphy v. Railroad, 89 Ga. 832, 15 S. E. 774.

(5) Patton v. Railroad, supra; Minty v. Railroad, 2 Idaho, 437, 21 Pac. 660, 4 L. R. A. 409; Davidson v. Davidson, 46 Minn. 117, 48 N. W. 560; Bryan v. Railroad, 90 Cal. 496, 27 Pac. 371; Redmond v. Lumber Co., 96 Mich. 545, 55 N. W. 1004; Klebe v. Parker Distilling Co., 207 Mo. 480, 105 S. W. 1057, 13 L. R. A. (N. S.) 140; Tex. & P. R. Co. v. Barrett, 166 U. S. 617, 41 L. Ed. 1136; Shandrew v. Railroad, 142 Fed. 320, 73 C. C. A. 430; Brownfield v. Railroad, supra; Vlissman v. Railroad, 28 Ky. L. R. 429, 89 S. W. 592, 2 L. R. A. (N. S.) 469; Neely v. Oil Co., 13 Okla. 356, 75 Pac. 537, 64 L. R. A. 145.

(6) See also Newhouse v. Railroad (W. Va.), 59 S. E. 1071; Blanton v. Dodd, 109 Mo. 64, 74, 18 S. W. 1149; Barnowsky v. Nelson, 89 Mich. 523.

the cause, also presents a further reason, and that is the contract obligation, as to the passenger, to carry him safely while there is merely an obligation by employer to exercise reasonable care in giving the servant a safe place and machinery, and there is no guaranty that the place or machinery shall be safe.⁷ When the accident may have arisen either from a co-employee's negligence or a master's negligence in not exercising such care, it has been held that the master will be presumed to have complied with his duty, and this would leave the former negligence to stand as a bar to recovery.⁸ What appears to the writer the most unsatisfactory as well as most unique of reasons for non-application of the doctrine in employee cases, is found in the opinion of the Missouri Supreme Court in the Klebe case, but happily the hope may be indulged, that, as what was said on this subject, is purely *obiter*, it may not become the established theory in that court. This court speaks of the difficulty of applying the principle of *res ipsa loquitur* to varying circumstances, and alluding to the rule as one of necessity thinks it should be applied only where it may be supposed that opportunity for giving explanation of the cause of an accident is not as well within the power of the employee as in that of employer. Therefore, it held that as the plaintiff in that case, whose duty it was merely to remove barrels of whisky from an elevator sent to the floor where he worked, should have known about the elevator's condition of safety, as well as the defendant, the occurrence in that case did not call for the application of the principle. In the first place, it is a very violent supposition, that an ordinary employee knows as well about the safety of a particular working place or machinery as does the employer upon whom the law enjoins the duty of providing for such safety,—especially when it had already been held by the same court, (see the Hurl-

bert case), that the employer enjoyed the presumption of having exercised such care, and, in the second place, it could only operate as to an employee who has been injured, but not killed. The court appears to the writer to have misapprehended or extended illogically, the ruling that where the instrumentality causing the injury is in the exclusive management and control of the defendant, he should explain what appears to have been negligence in its operation. The court's reasoning, when analyzed, would seem to unsettle another principle, that is, that there is no assumption of risk by a servant of negligence by the master, except danger therefrom is obvious. Certainly, if the master's negligence is presumed to be known by the servant then such negligence is obvious to the servant. At most, it ought not to be expected that the servant should do more than show his ignorance of a defect causing injury, and then let the jury say whether in due performance of his duty he ought to have known about it. The presumption as to knowledge by the servant is distinguished by a Georgia case, as follows: The presumption of law that plaintiff is without fault arises only when he is wholly disconnected with the duties of the particular business in which he is hurt.⁹ This conclusion clearly involves the thought that the servant is not supposed to know about the entire business. This is a limitation of the general principle applied in the Georgia jurisdiction, that the employee must show he was using due care.¹⁰

The General Underlying Principle of the Maxim.—What seems to me an accurate expression of this principle is found in a Vermont case, of *Houston v. Brush & Curtis*,¹¹ as follows: "Without attempting to formulate a rule embracing every case to which the maxim may be applied, we think it is clear from the authorities cited,

(7) See also *Newhouse v. Railroad*, *supra*.

(8) *Hurlbut v. Railroad*, 130 Mo. 657, 31 S. W. 1061.

(9) *Central R. & Bkg. Co. v. Kelly*, 58 Ga. 485.

(10) *East Tenn. V. & G. R. Co. v. Maloy*, 77 Ga. 237, 2 S. E. 941.

(11) 66 Vt. 331.

that when the defendant owes a duty to the plaintiff to use a certain degree of care, in respect to the thing causing the accident, to prevent the occurrence of such accident, and the thing is shown to be under his management, or that of his servants, and the accident is such as in the ordinary course of things does not occur, if those who have the management use proper care, it affords evidence, in the absence of evidence showing that it happened without the fault of the defendant, that it arose from the lack of requisite care." This is the rule laid down by Erle, C. J., in England in 1865.¹² Mr. Justice Holmes, when a member of the Supreme Judicial Court of Massachusetts, said: "*Res ipsa loquitur*, which is merely a short way of saying that so far as the court can see, the jury, from their experience as men of the world, may be warranted in thinking, that an accident of this particular kind commonly does not happen, except in consequence of negligence, and that, therefore, there is a presumption of fact, in the absence of explanation or other evidence, which the jury believe, that it happened in consequence of negligence in this case. The court ordinarily confines itself to considering whether it can say that there is no such presumption, or, in other words, that such accidents commonly are not due to negligence."¹³ Justice Holmes' rule should be qualified by the statement, that the doctrine should not be applied where there is fair doubt whether the negligence is or not that for which the party against whom it is invoked is responsible.

The Supreme Court of North Carolina is in evident accord with the Connecticut rule as it has thus spoken: "It is true that a common carrier is not an insurer of the safety of an employee, and neither does it insure the safety of a passenger; but where there is a collision, or a derailment, and in like cases, the presumption of negligence

arises. It is a rule of evidence, which in no wise springs out of the contract for carriage, but which arises from the fact that such things do not ordinarily happen unless there is negligence on the part of the carrier, and, therefore, it arises equally, whether the injured party is a passenger or an employee. The negligence of a fellow servant is a defense in cases where the injury occurred prior to the 'Fellow Servant Act.' But the rule of evidence—the presumption of negligence arising from a disaster of this nature—applies none the less in such cases."¹⁴

The Court of Appeals of New York, in a leading case,¹⁵ in an opinion by Justice Cullen, first holds that one riding in the elevator of an office building does not occupy the same relation to the owner of the building as does a passenger to a common carrier, but the duty of such owner to him is like that of an employer to employee in respect to the exercise of care to see that passengers, upon implied invitation, are in a safe place. Then adopting what had been held by that court, previously, that: "There must be reasonable evidence of negligence; but when the thing causing the injury is shown to be under the control of a defendant, and the accident is such as, in the ordinary course of business does not happen, if reasonable care is used, it does, in the absence of explanation by the defendant, afford sufficient evidence, that the accident happened from want of care on defendant's part," then goes on to say: "I can see no reason why the rule thus declared is not applicable to all cases, or why the probative force of the evidence depends on the relation of the parties."

Why the Occurrence of an Accident Calls for Application More in Passenger than in Employee Cases.—As we have seen under the common law doctrine as to fellow servants, the rule may be denied application as to an employee, because

(12) *Scott v. London & St. K. Dock Co.*, 3 H. & C. 596.

(13) *Graham v. Badger*, 164 Mass. 42, 41 N. E. 61.

(14) *Wright v. R. Co.*, 127 N. C. 227, 38 S. E. 221.

(15) *Griffen v. Mannice*, 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630.

it may not be clear that the cause lay in negligence of fellow servants. Indeed, the greater number of injuries, arising out of conduct of a business, are attributable to negligence of servants, and where no neglect of duty by the master has occurred. In the federal court, it has been deemed, by a circuit court of appeals, to be "settled law that as between master and servant the maxim *res ipsa loquitur* has no application,"¹⁶ a statement, however, which is rather sweeping, as has been said, in view of what was announced in the Patton case. At all events it would seem to be an extreme case to secure, in the federal courts, an application of the principle in behalf of an employee. Where by statute the common law rule as to fellow servants has been abolished, it was held by a federal circuit court,¹⁷ that the doctrine

applied to a collision causing the death of an employee riding in a caboose to his work as one of a section gang. The court said that without the statute the maxim would not apply "because it could not be told whether the deceased was injured by the negligence of a co-employee or by the fault of the company, through some independent officer or in relation of vice-principal."

We have already seen that if the question arises out of the obligation of the master to furnish a safe place or machinery, the occurrence must evince in and of itself, not only that the place or machinery was unsafe, but that it was negligent not to have anticipated and provided against such unsafety. Also the testimony might develop the conclusion that the master is not responsible for the accident, because the defect which was its cause was a latent defect that reasonable inspection would not probably discover.¹⁸

But a still further reason for non-application in an employee case and application in a passenger case, lies in the degree of care, which the defendant owes to the latter and not the former. Thus, as said in the Griffen case by Judge Cullen, where the maxim in behalf of a plaintiff, to whom the minor degree of care was held to be owing was applied: "Of course the relation of the parties may determine the fact to be proved,

(16) *Shandrew v. Railroad*, 142 Fed. 320, 73 C. C. A. 430.

(17) *Iarussi v. Railroad*, 155 Fed. 654, opinion by Sanborn, D. J.: This case must proceed on the theory that a collision of trains necessarily imparts negligence by the master, through a vice-principal or other servants, or combined by all. Therefore it is deemed an instance of such an obviously wrong thing that it overcomes the usual rule in respect to safe place and appliances, viz.: that the master should also be shown derelict in the exercise of ordinary care, a matter not touched by statutes abolishing the common law rule as to fellow servants. Whether such statutes mean that ordinary care or a high degree of care is required of fellow servants is another question. If the former only, it is apparent that there might be some absence of care not calling for application of the maxim of *res ipsa loquitur* in an employee case, when under the same circumstances it would be applied in a passenger case. It may be well said that reasonable effort to secure competent fellow servants is part of the obligation to exercise reasonable care in securing to any servant a safe place to work and, conclusively, that slight departure from competency would not import negligence. Further deduction might be made that negligence of a fellow servant does not mean slight negligence, but merely the absence of ordinary care. The most apposite case my research reveals on this subject is that of *St. Clair v. Railroad*, 122 Mo. App. 519, 99 S. W. 775. It was held there, as in the *Iarussi* case, that a collision arising out of negligence by servants operating trains (with which operation an employee on one of the trains was not connected), was a case of *res ipsa loquitur*. But the verdict was set aside because the trial court instructed on the high degree of care due from carrier to passenger. It was said: "Under its obligation of ordinary care to servants, the defendant certainly ought not to be expected nor required to exercise that high degree mentioned, in the

operation of its freight trains, in no sense intended for passenger service. Had this plaintiff been on a regular passenger coach and train where the obligation of high care extends to all passengers, he, being rightfully there, might possibly have the right to expect that same high degree of care in his own favor, for otherwise, two men being injured, one an employee rightfully there and not connected with the operation of the train, the other a passenger, different principles would determine the case of each." Our question, therefore, is only qualifiedly decided, as this obiter observation discloses. It is suggested, that as these statutes are in derogation of common law, construction thereof is strict, and that they do not mean any negligence, but only such as merely changes assumption, to non-assumption of risk. More pertinently too, I think, it may be said, that the rule of high degree of carrier to passenger is exceptional, and where there is not such relation, in its strict sense, no duty in such degree is meant.

(18) *Pallerni v. Paper Co.*, 96 Mo. 388, 52 Atl. 842; *Brymer v. Southern Pac. Co.* 90 Cal. 496, 27 Pac. 371; *Bajus v. Railroad*, 103 N. Y. 312, 57 Am. Rep. 723.

whether it be the want of the highest care or only want of ordinary care, and doubtless circumstantial evidence, like direct evidence, may be insufficient, as a matter of law, to show the want of ordinary care, though sufficient to prove absence of the highest degree of care. But the question in every case is the same, whether the circumstances surrounding the occurrence are such as to justify the jury in inferring the fact in issue." The Georgia Supreme Court has said, along the same line of thought, that: "It is safer and more in accord with probabilities to infer slight negligence than ordinary negligence."¹⁹

It is readily apparent that the several considerations I have instanced may often deny the application of the maxim to an employee case, when, regardless of the question of defendant being an insurer of safety or obligated by contract to care for safely, the same circumstances would justify the application of the maxim in a passenger case. I have discussed in Vol. 65 at pages 48 to 50 of this Journal whether or not situation or act or omission by a passenger should prevent application of the maxim in his behalf.

Many cases such as that considered in *Blanton v. Dodd*—a large ponderous machine around which plaintiff was working starting up without any reason which he could explain, and injuring plaintiff—and that considered in *Newhouse v. Railroad*—the suspension of or leaving suspended wire cables across a railroad track so low as to obstruct the passage of a train—and those of the nature instanced in *Wright v. Railroad*, impart negligence by the master or his servants so conclusively, that it would seem idle to tie down any such inference to a technical rule. As Judge Barclay said in the *Blanton-Dodd* case: "Some catastrophes are of a nature such as carry, in a mere statement of their occurrence, an implication of some neglect." The *Stearns* case placed the burden on plaintiff employee of showing "Either actual negligence or conditions which are so obviously dangerous as to

admit of no inference other than that of negligence."

On the whole it is believed that there does exist merely a general rule as to accident imparting negligence in behalf of a passenger, merely because such is, generally speaking, true in human experience, and the contrary rule, where the common law rule as to fellow servants obtains, for a like reason, but the underlying principle of probability governs the entire subject.

I may say, in conclusion, that the solution proposed by the Missouri Supreme Court, in the *Klebe* case, seems not recognized elsewhere, and that it appears more in accord with general authority, that any party having an affirmative proposition to establish, should have every benefit to be derived in the way of inference from a proven fact, whether there exists the incidental circumstance of presumptive knowledge on his part or not. A principle of general application ought not to be hedged around by any such accidental barrier, especially where such a presumption is not improbably opposed to the actual fact.

N. C. COLLIER.

St. Louis.

SALES—TERMS OF PAYMENT—"CASH SALE."

BERLAIWSKY v. ROSENTHAL.

Supreme Judicial Court of Maine. March 4, 1908.

In the absence of agreement or understanding between the parties as to terms of payment, the law presumes a sale to be a cash sale—that is, a sale conditioned on payment concurrent with delivery—and not a sale on credit, and a delivery in such case, f. o. b. car, as agreed, made in expectation of immediate payment, will not vest the title in the purchaser, and, if payment is not made, the vendor may repossess himself of the goods sold, and sell them to another.

SAVAGE, J.: Action of replevin of three tons of iron. The plaintiff bought the iron of one Weiner on a certain Wednesday at an agreed price to be delivered f. o. b. car at Anson, to be shipped to Waterville. Weiner loaded the iron on the car, and on the Monday following, while the car was still at Anson, he sold and delivered the iron to

(19) *Southern R. Co. v. Cunningham*, 123 Ga. 90, 50 S. E. 979.

the defendant, who then shipped it to Waterville, where it was replevied by the plaintiff. The question tried was, Which party had title?

At the trial there was evidence from which the jury might have found properly, if they believed, it, that the sale by Weiner to the plaintiff was understood as a cash sale, that the plaintiff was to send a check for it, and that Weiner held the iron at Anson until the check should be received. If so, the sale was conditional on payment, and, if no payment, unless payment was waived for the time being, the title to the iron did not pass to the plaintiff. *Stone v. Perry*, 60 Me. 48; *Seed v. Lord*, 66 Me. 580. And in such case the vendor, after a reasonable time, if payment was not made, might lawfully sell to another. But the verdict of the jury for the plaintiff negatived necessarily this proposition.

There was also evidence coming from the plaintiff himself tending to show that nothing whatever was said between the plaintiff and Weiner as to when the iron was to be paid for, and that there was no understanding as to the terms of payment. Upon this phase of the case the presiding judge instructed the jury, in substance, that if the iron was sold by Weiner to the plaintiff without any understanding as to the terms of payment, and if it was delivered on the car directed to the plaintiff in pursuance of their agreement, the iron belonged to the plaintiff, that the contract between them was completed, and that, if nothing more was said as to the terms of payment, the plaintiff had the right to the possession of the iron under the agreement, whether he sent his check for it or not. To these instructions the defendant has excepted.

The exceptions must be sustained. The court below seems to have proceeded upon the theory that, when a sale is made without any agreement or understanding as to terms of payment, it is to be deemed as sale on credit, in which case a delivery f. o. b. car, as agreed, would completely vest the title in the purchaser. But this is directly opposed to the doctrine declared in *Furniture Co. v. Hill*, 87 Me. 17, 32 Atl. 712, where it was said that, under such circumstances, "the law presumes that the parties intended to make the payment of the price and the delivery of the possession concurrent conditions. The plaintiffs [who were the vendors in that case] would have had the right to retain possession until the purchaser had been ready to perform his part of the contract; or, if the goods had been delivered with expectation of immediate payment, and this had not been done, the plain-

tiffs had the right to retake possession of the goods."

In the absence then of agreement or understanding, as to terms of payment, the law presumes a sale to be a cash sale—that is, a sale conditioned on payment concurrent with delivery—and not a sale on credit, and a delivery in such case f. o. b. car, as agreed, made in expectation of immediate payment, will not vest the title in the purchaser, and, if payment is not made, the vendor may repossess himself of the goods sold.

By this rule, under the evidence in this case, which is made a part of the bill of exceptions, if the jury had found, as they well might have found from the testimony of the plaintiff himself, that nothing whatever was said or understood between him and Weiner in regard to terms of payment, the jury would have been warranted in finding that the title to the iron was in the defendant, and not, in effect, necessarily in the plaintiff, as they were instructed. The instructions were therefore erroneous and prejudicial.

Exceptions sustained.

NOTE—Passing of Title Before Payment of Price.—A case in St. Louis Court of Appeals applies the principle held in the principal case to a contract where earnest money had been paid, the amount to be applied on the purchase price, and the following language in a prior case is approved: "It is a legal principle generally recognized, that where no express provision is made for the time of payment, a sale of personalty is presumed by law to be a cash transaction and the delivery of the property and the payment of the purchase price are concurrent, and the buyer is not entitled to demand *nor* to receive delivery or possession of the goods, the subject of the contract, without proffer of the purchase price or its actual payment. . . . The payment of the purchase price becomes a condition precedent, by legal implication, and except in the event of waiver by the vendor, title does not rest in the buyer until after performance of such condition." *Sharp v. Hawkins*, 129 Mo. App. 80, 107 S. W. 1087. See also *Strother v. Lumber Co.*, 200 Mo. 647, 98 S. W. 34. The *Sharp* case quotes from 24 Am. and Eng. Encyc. Law, 1053-1054, that: "The better doctrine adhered to in a few of the states appears to be that the transfer of title takes place immediately upon conclusion of the contract notwithstanding the fact of the transaction is for cash, the seller having a lien for the price, which entitles him to retain the possession of the chattel until the price is paid, but in the meantime the goods are at the risk of the seller." A recent Circuit Court of Appeals case is squarely on the side of the principal case. *N. W. Bank v. Silberman*, 154 Fed. 809, 83 C. C. A. 525. And such is the rule laid down in *Tiedeman on Sales*, Sec. 207 and *Benjamin on Sales*, Sec. 185. But in *Mechem on Sales*, Sec. 483, the rule is stated to be as follows: "When the terms of the contract of sale have been definitely agreed upon and the goods have been specifically ascertained

and nothing remains to be done by the seller except to deliver the goods, the effect of the contract, as between the parties thereto, will, unless a contrary intention appears, be to pass the title to the property immediately in the purchaser, even though the goods have not yet been delivered or paid for. The purchaser cannot indeed take the goods away until he has paid for them, unless a term of credit has been given, but the title and therefore the risk of the goods will be in him, and the seller may have his remedies for the price." In Delaware it was said: "Wherever there is a sale of personal property, when nothing remained to be done by the seller before it is delivered, the property passes to the buyer without delivery; and if injured or destroyed after the sale the loss falls on the purchaser, and the seller is entitled to payment of the price. *England v. Forbes*, 7 Houst. 301, 31 Atl. 895. This principle is stated in *Com. v. Hess*, 148 Pa. 98, 23 Atl. 977, 33 Am. St. Rep. 810, and very abundant authority with quoted extracts is given in the opinion rendered. A late case from Nebraska went to the extent of holding that a written instrument expressing that the sale is for cash, acknowledging part payment to bind the bargain with buyer to cut and stack certain hay, the subject matter of sale, same "to be paid for before taken from the farm" was a complete sale with plaintiff reserving merely a lien on the property until paid for. *Allen v. Rushfort* (Neb.), 101 N. W. 1028, 110 N. W. 687. This holding is squarely against the *Sharp and Silberman* cases *supra*. *Mechem on Sales* further says in Section 1407: "As has been already seen where the contract is silent as to the time of payment and no term of credit is agreed upon, the law presumes that the sale is for cash and that payment and delivery are to be immediate and concurrent acts. In the ordinary case of present sale, therefore, silent as to the time of payment or delivery, the seller is under obligation to make an immediate delivery and the buyer is required immediately and concurrently to pay the price in cash. The buyer consequently cannot obtain the goods until he has paid or tendered the price or the seller waives his right to its present payment; neither can the seller recover the price unless he has delivered or was ready to deliver the goods." This is not saying, however, that title does not pass, and to a prior section (542), much authority is given to the effect that the seller may retain possession but he does not retain the title. In Massachusetts the rule on this side has been quite accurately stated as follows: "It should be kept in mind that the question is not whether the title would have passed to the defendant so that it would be at his risk. In such a case the title would pass to the purchaser unless there was some agreement to the contrary, but the vendor would have a lien for the price and could retain possession until its payment." *Safford v. McDonough*, 120 Mass. 290.

Maturity of Difference in the Cases.—If the principle laid down in 2 Kent's Com. 496, is true that, "where no time is agreed on for payment, it is understood to be a cash sale, and the payment and delivery are immediate and concurrent acts, and the vendor may refuse to deliver without payment, and if the payment is not immediately made, the contract becomes void," then in a great many contracts, the distinction in the cases is practically immaterial. But it is

very material where payment is attempted to be made in some other form than money, as for example a check or draft which is subsequently dishonored. Possession is parted with or even if possession be retained there may be a substantial intervening period of time in which loss may occur. Under one theory the buyer is precluded from, and under the other he is entitled to recover the goods, or destruction of property may be the loss of one and not the other.

It is clear that a check or draft is no payment unless it is itself paid and is thus no more than an incident in the transaction, but commercial practice involving their so frequent use, instead of actual cash, would appear to make the rule announced in the principal case more consonant with modern conditions, than its opposite, and it seems to this annotator that ruling is tending more in the direction of the principal case. Whether commercial usage may be considered so potent a factor on the question as to raise "the legal implication" the St. Louis Court of Appeals speaks of may be a debatable proposition.

In Georgia the tendency seems to confine the non-vesting of title to contracts which contain an express condition that payment is to be made on delivery. *Wilson v. Comer*, 125 Ga. 500, 54 S. E. 355. In Kentucky it has been ruled that unless prepayment is expressly made a condition by the contract of sale, the fact of payment has no bearing on the transfer of title. *Com. v. Adair*, 28 Ky. 657, 89 S. W. 1130.

Check or Draft as Payment.—In Georgia it has been provided by statute and perhaps also in other states, that, if payment is required to vest title in purchaser, a check or draft does not accomplish vesting, unless it is paid. See *Charleston & W. C. Ry. Co. v. Pope & Fleming*, 122 Ga. 577, 50 S. E. 374. But I think this ought to follow as a sound principle. If as Chancellor Kent says, the contract of sale becomes void, if payment is not concurrent with delivery, certainly it ought to be true that the giving of a bad check or draft should not postpone that effect.

In North Carolina (*Hughes v. Knott*, 138 N. C. 105, 50 S. E. 586), the rule stated in the principal case is approved, but nevertheless the buyer seems to be ruled to assume risk of loss intermediate the delivery and payment, a ruling that appears to make the agreement to pay operate as a kind of penalty on non-performance. It ought to seem to a layman that settled decision should exist in matters like this, if law is to be deemed a science at all.

JETSAM AND FLOTSAM.

WHEN FEDERAL COURTS DO NOT FOLLOW STATE PROCEDURE IN SUITS AT COMMON LAW—BATES ON FEDERAL PROCEDURE AT LAW.

An impression has prevailed for some time among some members of the bar that section 914 of the United States Revised Statutes, commonly called the Act of Conformity, requires the federal courts in suits at common law to follow the state procedure in all things, even down to the most minute particulars, but there are many exceptions to the operation of this statute, in which the federal courts do not and

cannot follow the state procedure, and which have been fully pointed out by the author of Bates' "Federal Procedure at Law," just published by Messrs. T. H. Flood & Company, of Chicago. The main particulars in which the federal courts will not follow the state procedure in such actions are more particularly pointed out in chapters XVII-XXX inclusive, of the work, though those exceptions are discussed in other portions of the work. After demonstrating that the great outlines of federal procedure are laid in the federal constitution, it is shown that the federal courts will not follow the state procedure in suits at law in the following particulars:

(1) The federal courts will not follow the state procedure when that procedure blends and amalgamates legal and equitable remedies into one system; because, under the federal constitution, parties are given the right of trial by jury in a suit founded on legal causes of action, whilst equitable cause of action are required to be decided by the court sitting in equity. Most of the code states seek to effectuate a union of legal and equitable causes of action, while those causes must be separately tried in the federal courts.

(2) The federal courts, in suits at law, will not follow state procedure when that procedure allows actions at law, whether real or personal, to be brought upon an equitable title; to maintain an action at law in the federal courts, the plaintiff must possess the strict legal title.

(3) The federal courts will not follow the state procedure in suits at law where that procedure allows equitable defenses to be interposed to legal actions, nor will it allow equitable set-offs to be set up in legal actions.

(4) In actions at law in the federal courts, the service of process, and the appearance of the defendant are not controlled by state laws.

(5) The mode of trial in actions at law in the federal courts is controlled exclusively by federal statutes.

(6) The mode of proof in actions at law in the federal courts is controlled exclusively by federal statute, being by oral examination of witness in open court, depositions being allowed only in the particular instances specified in the federal statute.

(7) In actions at law in the federal courts, the compulsory production of documentary evidence by parties to the suit is controlled exclusively by federal statute.

(8) State laws which allow a verdict to be returned by a less number than the whole body of jurors cannot be followed in the federal courts. The jury trial, secured by the 7th amendment to the constitution, is such a jury trial as existed at common law,—a jury of 12 men, no more and no less, impaneled in a superior court of common law, presided over by a common law judge, authorized to rule upon the admission of evidence, and to instruct the jury upon the law of cases, and a unanimous verdict by the jury.

(9) In suits at common law in the federal courts, the judge is not controlled by the state procedure as to the manner of instructing the jury.

(10) In suits at common law, the state rules of procedure as to what written evidence the jury may carry with them upon retiring from the bar do not control in federal courts.

(11) In suits at common law in the federal courts the granting or refusing of new trials are not controlled by the state procedure.

(12) In trials at common law in federal

courts, the preparation of the case for review on writ of error by the appellate court, and the procedure to obtain that review, and the questions arising on the trial which may be reviewed by the appellate court, are controlled exclusively by federal law, and state procedure, in such matters, is wholly disregarded by the federal courts.

(13) No state statute in regard to the execution of judgments, enacted since December 1st, 1873, will be followed in the federal courts, unless such legislation has been adopted by the general rules of the circuit and district courts.

(14) State statutes authorizing interventions upon equitable titles in legal actions will not be followed in actions at law in the federal courts.

(15) Amendments of pleadings and process in the federal courts are controlled by federal statutes, where there is a disagreement between them and state statutes.

(16) In the federal courts, the trial of issues of fact by the court without the intervention of a jury, upon the written stipulation of the parties, and the review of the judgment in the appellate court in such cases, are controlled exclusively by federal laws.

(17) The federal courts will not conform to state procedure when to do so will conflict with any definite rule of procedure adopted by a federal statute.

(18) The act of conformity applies in "like causes," only, and when there is no "like cause" in the state courts, and there is a suitable procedure settled in the federal courts, the state procedure will not be followed.

(19) The federal courts are not bound by state statutes directing the submission of special issues to the jury.

(20) And it is shown in the work under review, that the personal administration of the federal judges in the discharge of their official duties and the exercise of their common law powers while sitting upon the bench is not controlled by state law.

HUMOR OF THE LAW.

They were asking the eminent lawyer why he took so large a fee from the trust.

"I think it was its largeness that made it easy to take," he smilingly answered.

Then the state's attorneys conferred.

"And didn't you stop to consider that the money was tainted?" they asked him.

"No," he ingenuously replied, "I only stopped to count it."

This closed the proceedings for the day.

A lawyer came into court drunk, when the judge said to him: "Sir, I am sorry to see you in a situation which is a disgrace to yourself and family and the profession to which you belong."

This reproof elicited the following colloquy:

"Did your Honor speak to me?"

"I did sir, I said, sir, that in my opinion you disgraced yourself and family, the court and the profession, by your course of conduct."

"May I-I-it please your Honor, I have been an attorney in-in-in this c-c-court for fifteen years, and permit me to say, your Honor, that this is the first correct opinion I ever knew you to give."—Philadelphia Ledger.

WEEKLY DIGEST.

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1. **Account Stated**—Questions for Jury.—Whether an account rendered and kept by the debtor for reasonable time without objection to it thereby became an account stated was for the jury.—*Davis v. Stephenson*, N. C., 62 S. E. 900.

2. **Adverse Possession**—Constructive Possession.—Where a junior claimant of land does not connect his title with that of the original patentee, there is not such contiguity of seisin with respect to dissevered tracts as renders actual possession of one constructive possession of the other.—*Hot Springs Lumber & Mfg. Co. v. Sterrett*, Va., 62 S. E. 797.

3.—**What Constitutes Possession**.—The mere fact that a river, used as a barrier on one side of land, fenced on the other sides, was not a perfect barrier against stock was not conclusive against the claim of possession of the land.—*Dunn v. Taylor*, Tex., 113 S. W. 265.

4. **Appeal and Error**—Findings.—The Supreme Court, on appeal from a judgment dissolving an injunction restraining a school committee from changing the school site and rebuilding a schoolhouse, is not bound by the facts found by the trial judge, but may review the evidence.—*Venable v. School Committee of Pilot Mountain*, N. C., 62 S. E. 902.

5.—**New Trial**.—Defendants held not entitled to urge as error an order directing that plaintiff submit to a new trial or remit a certain amount from the verdict.—*Kenway v. Hoffman*, Wash., 98 Pac. 98.

6. **Arbitration and Award**—Invalid Award.—The parties and their rights as to the subject-matter of an arbitration are not affected by an invalid award, or the judgment setting it aside, and they are relegated to their original status.—*Bray v. Staples*, N. C., 62 S. E. 780.

7. **Army and Navy**—Acts of Governor of Soldiers' Home.—An order promulgated and enforced by the governor of a Soldiers' Home, prohibiting the inmates from visiting complainant's saloon, held not actionable, unless false in substance and promulgated and enforced with knowledge of falsity and with malice.—*Rowan v. Butler*, Ind., 85 N. E. 714.

8. **Arrest**—Search for Concealed Weapons.—A police officer held authorized to search plaintiff for concealed weapons prior to taking him to the police station without rendering himself liable for false imprisonment, whether plaintiff was then under arrest or not.—*Gisske v. Sanders*, Cal., 98 Pac. 43.

9. **Associations**—Exclusion of Bookmaker from Track.—A bookmaker must show that he has exhausted the remedies afforded by the Turf Association before he can be heard to complain of the action of the race track judges in ruling him off the turf.—*Rabb v. Trevelyan*, La., 47 So. 455.

10. **Attorney and Client**—Death of Client.—Where a client who had employed an attorney to represent him in certain proceedings died prior to the institution thereof, his executors and trustees were entitled to refuse the attorney's tender of services, and employ other attorneys.—*In re Robbins*, 112 N. Y. Supp. 1032.

11. **Bankruptcy**—Contracts of Bankrupt.—A trustee in bankruptcy has no greater rights under a contract of the bankrupt than the latter would have.—*Hardy v. Weyer, Ind.*, 85 N. E. 731.

12.—**Evidence**.—A party refusing to produce evidence and consenting to submit the case on the record held not entitled to amend in order to make the case he might have made under the first pleading.—*Jackson v. Valley Tie & Lumber Co.*, Va., 62 S. E. 964.

13. **Bills and Notes**—Acceptance.—That a note, though dated January 25th, was not discounted until February 1st, and after defendant signed his name thereon, is evidence that it was not accepted by the payee until February 1st.—*International Bank v. Enderle*, Mo., 113 S. W. 262.

14.—**Bona Fide Purchasers**.—A purchaser of commercial paper who has reasonable cause to believe that the apparent owner is not the true owner, and participates in the fraud, does not acquire a good title.—*Third Nat. Bank of Columbus v. Poe*, Ga., 62 S. E. 826.

15.—**Indorsement**.—Under Negotiable Instruments Law, Sec. 114, an indorser in blank before delivery held presumed to be liable in accordance with the express language of the statute.—*Haddock, Blanchard & Co. v. Haddock*, N. Y., 85 N. E. 682.

16.—**Indorsements**.—Under Negotiable Instruments Act, Secs. 63, 64, held as between the immediate parties, it is not necessary that an indorsement should be accompanied by appropriate words in writing to show an intent to

be bound in some other capacity.—*Mercantile Bank of Memphis v. Busby, Tenn.*, 113 S. W. 390.

17. **Bridges**—Negligence.—Where a plank in a bridge gave way, causing injury to a horse, the driver was not guilty of negligence, though he had pulled the horse to one side of the bridge to avoid a hole on the other side.—*Sullivan v. City of Anderson, S. C.*, 62 S. E. 862.

18. **Brokers**—Authority of Broker.—The ordinary authority of a real estate broker is simply to find a purchaser, and he has no power to bind his principal by a contract of sale, unless it was intended to confer such additional authority.—*Bacon v. Davis, Cal.*, 98 Pac. 71.

19. **Carriers**—Delay in Transportation.—A carrier having been notified that special damages would result from delay in the shipment of machinery held liable therefor, though it could not refuse the shipment, and under the Hepburn act could not charge a higher rate for the additional risk.—*Chicago, R. I. & P. Ry. Co. v. Planters' Gin & Oil Co., Ark.*, 113 S. W. 352.

20.—Failure to Deliver Promptly.—Where consignees were refused their right to inspect goods before acceptance until too late to inspect and unload on Saturday, held that the carrier was liable for damages to the goods until taken in charge Monday morning.—*Missouri, K. & T. Ry. Co. v. Hopkins, Tex.*, 113 S. W. 306.

21. **Conspiracy**—Boycotts.—An order of the governor of a Soldiers' Home forbidding inmates to frequent complainant's restaurant, held not actionable, because others co-operated with the governor pursuant to an agreement.—*Rowan v. Butler, Ind.*, 85 N. E. 714.

22. **Contracts**—Consideration.—A contract to support plaintiff in consideration of her relieving defendant from his promise to marry her, which was enforceable, held based on a sufficient consideration.—*Henderson v. Spratlen, Colo.*, 80 Pac. 14.

23. **Corporations**—Authority of Officers.—A corporation held estopped to deny the authority of its executive committee to indorse a note for money which it knowingly received and used in its business.—*Thiden v. Goldy Mach. Co., Cal.*, 98 Pac. 39.

24.—Estoppel.—A corporation by its acquiescence held estopped to claim it did not execute an agreement, which in form was in the individual name of its president.—*Belzoni Oil Co. v. Yazoo & M. V. R. Co., Miss.*, 47 So. 468.

25.—Implied Conditions in Grant of Power.—The state is authorized to terminate a corporation's existence for breach of an implied condition in its charter that it will not violate the criminal laws.—*State v. French Lick Springs Hotel Co., Ind.*, 85 N. E. 724.

26.—Liability on Unpaid Stock.—The holder of unpaid stock in a corporation against whom a judgment creditor of the corporation proceeds by motion for execution under the statute may set off against his debt a prior debt of the corporation to him.—*Stinebaker v. National Restaurant Co., Mo.*, 113 S. W. 237.

27. **Covenants**—Restrictive Covenants.—

Where restrictive covenants are inserted for the benefit of lands which the grantor retains, they are enforceable between the grantees of the burdened land, but only by the grantor of the land retained and his assigns against the owners of the property burdened.—*Korn v. Campbell, N. Y.*, 85 N. E. 687.

28. **Criminal Laws**—Appeal from Justice Court.—Where the record on appeal from the circuit court affirmed conviction by a justice of the peace does not contain his judgment, certiorari directing the circuit court to send up the judgment will be issued.—*Jones v. State, Miss.*, 47 So. 479.

29.—Possession of Stolen Goods.—If the explanation as to the possession of recently stolen goods creates a reasonable doubt, the jury should acquit, unless the state proves the falsity of the explanation, in which case the jury may infer guilt from such mere possession.—*McDonald v. State, Fla.*, 47 So. 485.

30. **Criminal Trial**—Absence of Judge.—Absence of the judge for two minutes, during the argument of accused's counsel, held not erroneous.—*Skaggs v. State, Ark.*, 113 S. W. 346.

31.—Improper Argument.—Calling attention to the fact that accused had not called as a witness one jointly indicted with him, but against whom the prosecution had been dismissed, and asking the jury to consider the fact as a strong circumstance showing accused's guilt, held improper argument.—*Harville v. State, Tex.*, 113 S. W. 233.

32.—Intoxicating Liquors.—Judicial notice may be taken that ordinary beer, containing such a percentage of alcohol as may produce intoxication, is an intoxicating liquor.—*O'Connell v. State, Ga.*, 62 S. E. 1007.

33. **Damages**—Personal Injuries.—In an action for the loss of the tips of all four fingers of plaintiff's left hand, a verdict for \$2,080 was not excessive, where it appeared that plaintiff was 28 years of age, and that his earning capacity was impaired to the extent of about \$1 per day.—*Duskey v. Green Lake Shingle Co., Wash.*, 98 Pac. 99.

34. **Depositaries**—Designation by Supervisors.—Where county supervisors are authorized to designate banks for deposit of county funds, such direction must be by legislation published in accordance with the statute.—*People v. Reoux*, 112 N. Y. Supp. 1025.

35. **Discovery**—Scope of Examination.—In a suit to enjoin defendants from conspiring to deprive plaintiff of the use of a trade-name, the scope of the examination for facts of one of defendants stated.—*Solar Baking Powder Co. v. Royal Baking Powder Co.*, 112 N. Y. Supp. 1013.

36. **Divorce**—Support and Custody of Children.—Under Civ. Code, Sec. 133, the court held authorized to make an order, after a decree of divorce, for the support and custody of the children of the parties.—*Harlan v. Harlan, Cal.*, 98 Pac. 32.

37. **Ejectment**—Riparian Rights.—The right to the continued enjoyment of a franchise in the waters of a navigable stream, granted by a riparian owner, being an incorporeal hereditament, ejectment will not lie to recover possession thereof.—*Coquille Mill & Mercantile Co. v. Johnson, Or.*, 98 Pac. 132.

38. **Electricity**—Fire Caused by Wire.—In an action against a telephone company for damage to a store by fire caused by the negligent main-

tenance of defendant's wires, the evidence held to sustain a verdict for plaintiff.—*Staunton Mut. Telephone Co. v. Buchanan*, Va., 62 S. E. 928.

39. **Estoppel**—Acceptance of Benefits.—One who fails to sue under a forthcoming bond until he has claimed the fund arising from the sale under judicial process of the property, the production of which the forthcoming bond secured, is confined to his election.—*Barnes v. Vandiver*, Ga., 62 S. E. 994.

40. **Evidence**—Accommodation Parties.—The maker of a bill, after acceptance, is an indorser, within Negotiable Instruments Law; and, as between the drawer of a bill and a third person indorsing it, parol evidence is admissible to determine the liability between them.—*Haddock, Blanchard & Co. v. Haddock*, N. Y., 85 N. E. 682.

41.—**Admissions**.—Where two or more persons combine in criminal and civil cases as to the admissibility of acts and declarations of one conspirator as original evidence against each member of the conspiracy.—*Henderson-Snyder Co. v. Polk*, N. C., 62 S. E. 904.

42.—**Presumptions**.—The law presumes that public officials discharge their duties in conformity with the statutes, and the burden of showing the contrary rests on him who relies thereon.—*McLean v. Farmers' Highline Canal & Reservoir Co.*, Colo., 98 Pac. 16.

43.—**Principal or Surety**.—A person signing an obligation as a joint maker may show by parol that he is surety only.—*Smith v. First Nat. Bank of Fitzgerald*, Ga., 62 S. E. 826.

44. **Executors and Administrators**—Proceedings for Appointment.—Where it is not shown with absolute certainty that a husband may not have been present in the city of his former home in which his wife was, and he remained silent and did not disallow a child, the status of legitimacy is fixed.—*Succession of Ledet*, La., 47 So. 506.

45. **False Imprisonment**—Civil Liability.—A police officer held not liable for the detention of a prisoner after delivering him to the police station, his authority over the prisoner ceasing at that time.—*Gliske v. Sanders*, Cal., 98 Pac. 43.

46. **Frauds, Statute of**—Parol Agreements.—An agreement by decedent held sufficiently definite, within the rule that parol agreements to sell land can only be enforced when definite.—*Reed v. Reed*, Va., 62 S. E. 792.

47.—**Part Performance**.—A verbal sale of a soda water fountain, with pitchers and paraphernalia, is valid, within the statute of frauds (Code 1906, Sec. 4779), on a pitcher, a part of the outfit, being delivered.—*L. A. Becker Co. v. D. A. Davis Drug Co.*, Miss., 47 So. 468.

48. **Fraudulent Conveyances**—Rights of Grantor.—A grantor in a deed given to delay creditors will not be allowed to set up that it was so given, and that plaintiff in acquiring title from the grantee therein knew of such fact.—*Tune v. Beeland*, Ga., 62 S. E. 976.

49. **Homicide**—Degree of Offense.—Where an accused was either guilty of murder or innocent of any offense, a charge on manslaughter held reversible error.—*Stovall v. State*, Miss., 47 So. 479.

50.—**Evidence**.—On a trial for murder by stabbing, proof that in the course of accused's flight, after the killing, a knife resembling the one he had owned was found, held admissible to show his ability to commit the offense.—*People v. Del Vermo*, N. Y., 85 N. E. 690.

51.—**Self-Defense**.—An instruction on self-

defense, where the person, at whom defendant shot, shot first, held improperly modified by the condition that defendant should have been without fault in bringing on the difficulty.—*Garner v. State*, Miss., 47 So. 500.

52.—**Threats**.—If a long period intervenes between the threat and the act, and no attempt to do it is shown, and between the threat and the act a feeling of ill will is changed to a feeling of good will, the probative value of the threat would be negligible.—*Crumley v. State*, Ga., 62 S. E. 1005.

53. **Husband and Wife**—Debt of Husband.—A wife may procure a third person to pay the debt of her husband, and will be bound by her contract to reimburse him.—*Third Nat. Bank of Columbus v. Poe*, Ga., 62 S. E. 826.

54.—**Deeds**.—A partition deed to husband and wife of the wife's interest as heir in certain land, held not to entitle the husband to retain the whole by survivorship.—*Sprinkle v. Spainhead*, N. C., 62 S. E. 910.

55.—**Payment of Paraphernal Claims**.—The husband may lawfully convey property to a wife in payment of her just paraphernal claims, whether there be a separation of property between them or not.—*Pons v. Yazoo & M. V. R. Co.*, La., 47 So. 449.

56. **Indemnity**—Rights of Indemnatee.—Where there is a direct promise to pay a debt indemnified against, suit will lie for breach of the contract in favor of the indemnatee, upon maturity of the debt and without payment of the debt by him.—*Helms v. Appleton*, Ind., 85 N. E. 733.

57. **Intoxicating Liquors**—Illegal Sale.—One selling liquors in violation of local option can be convicted therefor, though there is a special statute prohibiting the sale of liquors in the locality.—*Borroum v. State*, Miss., 47 So. 480.

58.—**Police Regulations**.—Under Const. art 11, Sec. 11, authorizing any city to make and enforce police regulations not in conflict with general laws, a city has police power to suppress the retail sale of intoxicating liquors, as beverages, within its limits.—*Town of Selma v. Brewer*, Cal., 98 Pac. 61.

59. **Judgment**—Full Faith and Credit.—The courts cannot deny to a judgment of another state for money lost in "futures" full faith and credit, under Const. U. S. art. 4, Sec. 1, because dealing in "futures" is a misdemeanor in the state.—*Armstrong v. Minkus*, Miss., 47 So. 467.

60.—**Obtained by Fraud**.—Under the system empowering the courts to administer full relief in one action, when a party attacks a judgment, pleaded in bar as procured by fraud, it is a direct proceeding.—*Houser v. W. R. Bonsal & Co.*, N. C., 62 S. E. 776.

61. **Landlord and Tenant**—Leases.—Where an unregistered lease from a general agent to his principal was found among the agent's papers after his death, such possession of the lease as agent, in the absence of a showing that he was authorized to accept it, does not show a valid delivery.—*Smith v. Moore*, N. C., 62 S. E. 892.

62.—**Unlawful Detainer**.—Proceedings in unlawful detainer in which the rules of evidence to forcible entry and detainer are applicable are limited to cases involving the relation of landlord and tenant.—*Richmond v. Superior Court of California*, Cal., 98 Pac. 57.

63. **Larceny**—Possession of Stolen Goods.—Where a party is found in the possession of recently stolen goods, yet, if the jury do not be-

Heve his explanation, they have a right to convict on such fact alone.—*McDonald v. State*, Fla., 47 So. 485.

64. **Libel and Slander**—Joint Defendants.—As a general rule, an action for slander may not be maintained jointly against two or more persons, in the absence of allegations showing a conspiracy.—*Rice v. McAdams*, N. C., 62 S. E. 774.

65.—**Newspaper Reports**.—Newspapers held not liable as for imputed malice for the mere publication of charges against a bookmaker of swindling and conspiring to swindle, and the action taken by the constituted racing authorities.—*Rabb v. Trevelyan*, La., 47 So. 455.

66. **Licenses**—**Riparian Rights**.—A boom in a navigable stream having been constructed under a license from the riparian owner, the licensee and his privies were thereafter estopped from denying the owner's riparian rights in the stream or those of any one claiming under him.—*Coquille Mill & Mercantile Co. v. Johnson*, Or., 98 Pac. 132.

67. **Limitation of Actions**—Notes.—Indorsements of interest payment on a firm note by one of the partners, after the note had been filed as a claim against the firm, from entries on the firm's ledger, held insufficient to toll the statute.—*Bulcken v. Rhode*, S. C., 62 S. E. 786.

68. **Lost Instruments**—Establishment.—To establish a lost instrument as a muniment of title, there must be conclusive proof of its former existence, loss and contents.—*Smith v. Lurty*, Va., 62 S. E. 789.

69. **Mandamus**—Compelling Issuance of Certificate to Physician.—The court in mandamus to compel the state board of health to issue a certificate to practice medicine cannot presume against the fairness of the board.—*Webster v. State Board of Health of Kentucky*, Ky., 113 S. W. 415.

70.—**Payment of Debts and Claims**.—Mandamus held the proper remedy to enforce payment of a claim against a county for which warrants have been issued.—*City & County of Denver v. Bottom*, Colo., 98 Pac. 13.

71.—**State Officers**.—Mandamus will not issue commanding a state officer to do that which the law does not authorize him to do.—*State ex. rel. Tebault v. Michel*, La., 47 So. 460.

72. **Master and Servant**—Assumed Risk.—That a quarry employee did not know that the rock which fell upon him was loose and likely to fall sufficiently alleges that he did not assume the risk of injury therefrom.—*Mitchell Lime Co. v. Nickless, Ind.*, 85 N. E. 728.

73.—**Contributory Negligence**.—A railroad company, creating by its negligence an emergency justifying a freight conductor in going between cars to couple them, held not entitled to show that the conductor was negligent as a matter of law because of a slight miscalculation in the usual position of danger.—*Hall v. Northwestern R. Co.*, S. C., 62 S. E. 348.

74.—**Duty to Warn**.—The inexperience of a servant must come either actually or by inference to the knowledge of the master, to charge him with the duty of warning the servant.—*Stolarz v. Algonquin Co.*, N. J., 71 Atl. 57.

75.—**Imputed Negligence**.—Where plaintiff's employer was present and gave the order, the execution of which caused plaintiff's injury, it was imputable to the employer, even though the physical act causing the injury was that of

a co-employee acting in obedience to the order.—*Wade v. McLean Contracting Co.*, N. C., 62 S. E. 919.

76.—**Master's Liability for Injury**.—An employer whose servants are to bring wheat to a vessel to be loaded by stevedores is not responsible for an act resulting from the failure of the stevedores to properly direct such employees.—*Stewart v. Balfour*, Wash., 98 Pac. 103.

77.—**Negligence of Fellow Servant**.—If, while helping to carry a timber, an employee stumbled and fell, and while down his fellow servants negligently dropped their end of the timber, and such negligence proximately caused the injury, defendant was negligent.—*Rushing v. Seaboard Air Line Ry. Co.*, N. C., 62 S. E. 890.

78.—**Reliance on Promise to Repair**.—A servant working with a defective appliance after the master's promise to repair can recover for an injury sustained therefrom within a reasonable time after the promise.—*Marcum v. Three States Lumber Co.*, Ark., 113 S. W. 357.

79.—**Scope of Authority**.—If the master employs a watchman and authorizes him to use firearms in his discretion, and he shoots a third person near the premises, he is not as a matter of law acting without the scope of his employment.—*Robards v. P. Bannon Sewer Pipe Co.*, Ky., 113 S. W. 429.

80. **Mortgages**—Assumption of Mortgage Debt.—A covenant in a deed, by which the grantee assumes the payment of a mortgage on the land, creates an obligation on which the mortgagee may sue the grantee covenantor for the indebtedness assumed.—*Curry v. La Fon*, Mo., 113 S. W. 246.

81.—**Assumption of Payment**.—The assumption by a purchaser of incumbered property of the payment of the obligation is a sufficient consideration for the extension of time of such payment.—*Huene v. Cribb*, Cal., 98 Pac. 78.

82.—**Sale**.—The title of a third possessor, a stranger to the proceedings, cannot be divested by a sale under executory process issued on a mortgage note which had been previously paid.—*Pons v. Yazoo & M. V. R. Co.*, La., 47 So. 449.

83. **Municipal Corporations**—**Defective Sidewalks**.—A city must take notice that wooden sidewalks will decay, and it is not enough that the surface of the walk appears sound, but it must be examined and kept in repair.—*Billings v. City of Snohomish*, Wash., 98 Pac. 107.

84.—**Ordinance as to Hucksters**.—The fact that the state and county had issued hucksters' licenses to persons prohibited from hawking by a city ordinance held not to render the ordinance inoperative.—*Dutton v. Mayor and Aldermen of Knoxville*, Tenn., 113 S. W. 381.

85.—**Power over Streets**.—The general power of a municipal government over its streets extends as well to the power to order removal of trees for the preservation of city sewers laid in the streets as for their removal as an obstruction to travel.—*Rosenthal v. City of Goldsboro*, N. C., 62 S. E. 905.

86. **Negligence**—**Contributory Negligence**.—In an action for negligence, the refusal to charge that negligence, however slight, on the part of plaintiff, if contributory, precludes a recovery, is erroneous.—*Hartman v. Joline*, 112 N. Y. Supp. 1057.

87.—**Defective Sidewalks**.—Where there is actionable negligence in the slippery condition of a coal hole cover in a sidewalk, even with-

out the rain, held that the city is not relieved of liability because the cover was wet with rain at the time of the accident.—*Smith v. City of Tacoma, Wash.*, 98 Pac. 91.

88.—**Excavating**.—The negligence of a lessor will not preclude recovery by his lessee in possession of a building against an adjoining proprietor whose negligent excavating caused the wall of the building to fall.—*Contos v. Jamison*, 5 C., 62 S. E. 867.

89. **New Trial**.—Excessive Verdict.—A new trial should not be granted merely because the trial judge would have found a less amount than that found by the jury, unless the opinion of the judge amounts to a clear conviction that injustice has been done by an excessive verdict.—*Hall v. Northwestern R. Co.*, S. C., 62 S. E. 348.

90. **Obstructing Justice**.—Threats.—Threats alone are not sufficient to constitute the offense of obstructing officer in the execution of process, under Pen. Code, 1895, Sec. 306.—*Allen v. State, Ga.*, 62 S. E. 1003.

91. **Parent and Child**.—Support of Infant Child.—If a parent is poor, and the estate of his infant children more able to justly bear the expense, held, that the parent may recover therefrom for their support.—*Funk's Guardian v. Funk, Ky.*, 113 S. W. 419.

92. **Parties**.—Subscription Contracts.—A bank, under a subscription contract, held a trustee of an express trust to collect the subscriptions, and was therefore the only person entitled to sue.—*Los Angeles Nat. Bank v. Vance, Cal.*, 98 Pac. 58.

93. **Partnership**.—Real Estate.—By the English rule, partnership realty is converted into personality to all intents and purposes, but the general rule in this country limits the conversion to the purpose of the partnership.—*Mann v. Paddock, Va.*, 62 S. E. 951.

94. **Pleading**.—Demurrer.—On demurrer to a pleading because not signed by counsel, it was within the discretion of the court to permit counsel to sign it, and thus remove the ground of objection.—*McIntyre v. Smyth, Va.*, 62 S. E. 930.

95. **Principal and Surety**.—Discharge of Surety.—Equity of surety to be discharged when prejudiced by any act of the creditor held not to depend on the fact that it is inequitable in the creditor knowingly to prejudice the surety.—*Smith v. First Nat. Bank of Fitzgerald, Ga.*, 62 S. E. 826.

96. **Prohibition**.—Justices of the Peace.—A police justice of a city held not to possess jurisdiction to impose a fine for digging up a street, where accused has set up a fee-simple ownership of the land though there is an absolute right of appeal.—*Martin v. City of Richmond, Va.*, 62 S. E. 800.

97. **Public Lands**.—Surveys.—Until the government elects to correct mistakes in an original survey of public lands, no one can dispute the title of the holders of a prima facie title.—*Little v. Williams, Ark.*, 113 S. W. 340.

98. **Railroads**.—Accident at Crossing.—Where, if an engineer was negligent, it was before a traveler had imprudently attempted to cross, the railroad company cannot be held liable on the ground that, after a discovery of the traveler's danger, it might have avoided the collision with him.—*Stearns v. Boston & M. R. R.*, N. H., 71 Atl. 21.

99.—**Contributory Negligence**.—Whether a

person of ordinary prudence, having reached the conclusion that his prudent course was to cross the track ahead of a train, would then have given his whole attention to doing so, and not have again looked, held a question of fact.—*Stearns v. Boston & M. R. R.*, N. H., 71 Atl. 21.

100.—**Duty to Look and Listen**.—A driver in approaching a railroad track held required to look, only where by so doing he could have discovered the approaching train.—*Vance v. Atchison, T. & S. F. Ry. Co., Cal.*, 98 Pac. 41.

101.—**Duty Towards Trespassers**.—One who boarded a switch engine in a switch yard without invitation, and in violation of the company's rule, was a trespasser, to whom the company did not owe the duty it owes to its employees rightfully on the engine.—*Bailey v. North Carolina R. Co.*, N. C., 62 S. E. 912.

102.—**Injuries to Persons on Track**.—In an action for the death of a person on a railroad track, held error to exclude evidence that the track was habitually used as a way.—*Thompson v. Aberdeen & A. R. Co.*, N. C., 62 S. E. 883.

103.—**Negligence**.—A failure to stop a train after the danger of a traveler on the highway became apparent cannot be held to be the cause of the collision where the only situation in which the train could have been stopped must have been one from which no injury would have resulted.—*Stearns v. Boston & M. R. R.*, N. H., 71 Atl. 21.

104. **Rape**.—Evidence.—In a prosecution for rape, evidence of prosecutrix's physical appearance, and the condition of the place where the crime was committed, are admissible in corroboration.—*Skaggs v. State, Ark.*, 113 S. W. 346.

105. **Receivers**.—Liabilities on Bond.—A surety of a special receiver appointed in vendor's lien proceedings, and authorized by the court to sell purchase-money bonds became responsible for a proper accounting of the money received therefor by such receiver.—*Bowman v. Liskey, Va.*, 62 S. E. 942.

106. **Replevin**.—Conditions Precedent.—One lawfully in possession of property which he is holding for the rightful owner with intent to deliver it to him on demand held entitled to a demand for the delivery of property before suit can be maintained against him.—*Burke v. Maguire, Cal.*, 98 Pac. 21.

107. **States**.—Priority as Creditor.—The state held entitled to priority over other creditors of a defaulting public officer in the collection of its delinquent revenue on his bond.—*United States Fidelity & Guaranty Co. v. Rainey, Tenn.*, 113 S. W. 397.

108. **Statutes**.—Construction.—Laws imposing privilege taxes on plumbers, etc., approach an abridgment of the liberty of the citizen guaranteed by the fourteenth amendment to the federal constitution, and should be strictly construed.—*Wilby v. State, Miss.*, 47 So. 465.

109.—**Subjects and Titles of Acts**.—The title of an act entitled "An act to regulate the practice of medicine and surgery" held broad enough to include provisions which forbid a person to call himself "doctor," "physician," or "surgeon."—*State v. Pollman, Wash.*, 98 Pac. 88.

110.—**Validity**.—A curative act can operate only on something which the legislature might validly have enacted in the first instance.—*Wright v. Johnson, Va.*, 62 S. E. 948.

111. **Street Railroads**.—Negligence.—Position of a street car passenger, standing on the outer edge of an open car, held perilous as a matter

of law.—*Richmond St. & I. Ry. Co. v. Beverley, Ind.*, 85 N. E. 721.

112.—*Negligence*.—Where a passenger on a street car was injured in a collision between the car and a city hose wagon, the railway company was responsible for the negligence of the conductor in failing to discover and avert the danger, as well as for the negligence of the motorman.—*Williamson v. St. Louis & M. R. R. Co., Mo.*, 113 S. W. 239.

113.—*Use of Highway*.—The right of a surface railroad company to use its cars within the bounds of a highway includes the right to do such things and make such noises as are necessary, usual, and incidental to such use.—*Hoag v. South Dover Marble Co., N. Y.*, 85 N. E. 667.

114.—*Taxation—Assessment*.—From the full amount of capital and accumulated surplus of trust companies, the true value of all the assets exempt from taxation is to be deducted, and the balance thus ascertained is the amount on which the tax is to be assessed, less the assessment on their real estate.—*Fidelity Trust Co. v. Board of Equalization of Taxes of New Jersey, N. J.*, 71 Atl. 61.

115.—*Involuntary Payment*.—Payment of taxes to be involuntary, so as to authorize a recovery thereof, must be made on compulsion to prevent the immediate seizure of the taxpayer's goods or the arrest of his person.—*Cincinnati, N. O. & T. P. R. Co. v. Hamilton County, Tenn.*, 113 S. W. 361.

116.—*Telegraphs and Telephones—Failure to Deliver Death Message*.—A telegraph company held liable for injuries caused by its failure to deliver a death message beyond its free-delivery limits, where no demand for extra delivery charges was made, nor opportunity given to guarantee or pay them.—*Martin v. Western Union Telegraph Co., S. C.*, 62 S. E. 833.

117.—*Trade-Marks and Trade-Names—Infringement*.—In a suit to enjoin defendants from using a trade-mark and from conspiring to deprive plaintiff of its use, if the right to and ownership of the name is in defendants, or one of them, plaintiff would not be entitled to the relief demanded.—*Solar Baking Powder Co. v. Royal Baking Powder Co.*, 112 N. Y. Supp. 1013.

118.—*Trial—Non-Suit*.—Where the arm of a passenger was injured by the falling of the car window, and there was no evidence that the window catch was defective, or that defendant's servants set the window unlatched, a nonsuit was proper.—*Rosengarten v. Delaware, L. & W. R. Co., N. J.*, 71 Atl. 35.

119.—*Trusts—Accounting by Trustee*.—Charging a trustee with the value of cotton rents at time of sale of cotton, instead of when it was received, held not ground for reversal, in the absence of a showing of difference in values at such times.—*Cunningham v. Cunningham, S. C.*, 62 S. E. 845.

120.—*Undue Influence*.—A trustee may not accept property from his beneficiary who is infirm and of enfeebled mind, unless the transaction was entirely fair and free from improper influence, and such transaction is prima facie voidable.—*Fish v. Fish, Ill.*, 85 N. E. 662.

121.—*Vendor and Purchaser—Rights of Parties*.—A permanent nuisance not being created by a railroad embankment, held, that the

cause of action for future overflows of adjoining land was in the one owning the land at time of the overflows.—*St. Louis Southwestern Ry. Co. of Texas v. Long, Tex.*, 113 S. W. 316.

122.—*Rights of Parties*.—Where the purchasers of land took possession and removed a building therefrom, and refused to carry out their agreement, held they were liable for the value of the building though the vendor assented to its removal.—*Twitchell v. Benjamin, Wash.*, 98 Pac. 109.

123.—*Waters and Water Courses—Contract to Furnish Water*.—A covenant in a lease to furnish water for irrigation held not complied with by furnishing a well with the cap locked, so that water could not be obtained without breaking the lock.—*Smith v. Hicks, N. M.*, 98 Pac. 138.

124.—*Injunction—Making an Injunction against the use of a stream conditional on plaintiff consenting that defendant may clean out the stream held not to require defendant to clean it out*.—*Mason v. Apache Mills, S. C.*, 62 S. E. 871.

125.—*Irrigation*.—Where a water rights decree did not fix the acreage to be irrigated, the actual use of water within a reasonable time after the decree held relevant to determine the extent of the appropriation.—*Bates v. Hall, Colo.*, 98 Pac. 3.

126.—*Protection of Water Rights—Rights to the use of water for irrigation are of such importance to those entitled to take from a common source that courts should exercise great care in granting ex parte injunctions affecting such rights*.—*McLean v. Farmers' Highline Canal & Reservoir Co., Colo.*, 98 Pac. 16.

127.—*Public Supply*.—A water company's rule authorizing the cutting off of supply for nonpayment of bills for prior service, within thirty days, while reasonable as to persons under contract to pay the rents, is unreasonable as to a tenant refusing to pay rents due by a landlord or former tenant.—*Poole v. Paris Mountain Water Co., S. C.*, 62 S. E. 874.

128.—*Wills—Construction*.—In a devise to one "during her natural life then to the heirs of her body, if any; if no children to her sisters," the words "heirs of her body" held equivalent to the word "children," so as to vest in the devisee an estate for life.—*Johnson v. Smith, Va.*, 62 S. E. 958.

129.—*Jurisdiction of Court of Equity*.—The jurisdiction of the court of equity in matters of construction of wills grew out of its general control over trusts and trustees, and equity can only take jurisdiction when trusts are involved.—*Haywood v. Wachovia Loan & Trust Co., N. C.*, 62 S. E. 915.

130.—*Testamentary Capacity*.—Where testator's sanity is in issue by evidence, the burden is on proponent to show to the satisfaction of the jury his testamentary capacity, but the presumption of sanity obtains upon the trial of that issue until overcome by contestant's evidence.—*Hopkins v. Wampler, Va.*, 62 S. E. 926.

131.—*Witnesses—Questions Concerning Moral Character*.—A witness may be asked on cross examination whether he has been convicted of a felony, or of any crime involving a want of moral character.—*Slater v. United States, Okl.*, 98 Pac. 110.